IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and **THE STATE OF COLORADO**,	)	
Plaintiffs,	)	**Civil Action No. 97-B-10**
v.	)	
VAIL RESORTS, INC., **RALSTON RESORTS, INC.** and **RALSTON FOODS, INC.**,	)	
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States and the State of Colorado filed a civil antitrust Complaint on January 3, 1997, alleging that the proposed acquisition by Vail Resorts, Inc. ("Vail") of the ski resort businesses of Ralston Resorts, Inc. ("Ralston") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Vail and Ralston are the two largest owner/operators of ski resorts in Colorado, and that this transaction would combine several of the largest ski resorts in this region. In particular, this acquisition would increase substantially the concentration among ski resorts to which several hundred thousand skiers residing in the "Front Range" of

Colorado -- the geographic area lying just east of the Rocky Mountains, and including the metropolitan areas of Fort Collins, Boulder, Denver, Colorado Springs, and Pueblo and surrounding population areas -- can practicably go for day or overnight ski trips. As a result, the acquisition would threaten to raise the price of, or reduce discounts for, weekend and day skiing to consumers living in these areas. The acquisition would thus violate Section 7 of the Clayton Act. The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act, 15 U.S.C. § 18; and (2) a permanent injunction preventing Vail and Ralston from carrying out the Stock Purchase Agreement, dated July 22, 1996, or from entering into or carrying out any agreement, understanding or plan, the effect of which would be to combine the businesses or assets of Vail and Ralston.

At the same time the Complaint was filed, the United States and the State of Colorado also filed a proposed settlement that would permit Vail to complete its acquisition of Ralston's ski resorts, but requires a divestiture that would preserve competition for skiers in the Front Range. This settlement consists of a Stipulation and a proposed Final Judgment.

The proposed Final Judgment orders the parties to sell all of Ralston's rights, titles, and interests in the Arapahoe Basin resort in Summit County, Colorado to a purchaser who has the capability to compete effectively in the provision of skiing for Front Range Colorado skiers at Arapahoe Basin. The parties must complete the divestiture of these ski resorts and related assets before the later of one-hundred-and-fifty (150) calendar days after the filing of the Stipulation settling this action or five (5) business days after the entry of Final Judgment, in accordance with the procedures specified in the proposed Final Judgment. The Stipulation and proposed Final Judgment also impose a hold separate agreement that requires defendants to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, Ralston's Arapahoe Basin operations will be held separate and apart from, and operated independently of, Vail's and Ralston's other assets and businesses. Defendants must hire, subject to the prior approval of the United States, a person to serve as chief executive officer of Arapahoe Basin, who shall have complete authority to operate Arapahoe Basin in the ordinary course of business as a separate and independent business entity.

The United States, the State of Colorado, Vail, and Ralston have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Parties and the Proposed Transaction

Vail Resorts, Inc. ("Vail"), a Delaware corporation headquartered in Vail, Colorado, owns Vail Associates, Inc., which owns and operates two Colorado ski resorts: Vail and Beaver Creek Resort. (Beaver Creek Resort includes the formerly independent Arrowhead Mountain.) During the 1995-96 ski season, Vail's resorts accounted for approximately 280,000 Front Range skier days. A "skier day" is one day or part of a day of skiing for one skier. This is about a 12 percent share of the Front Range market. Overall, Vail's resorts had over 2.2 million skier days and had revenues of over $140 million.

Ralston Resorts, Inc. ("Ralston"), a Colorado corporation headquartered in Keystone, Colorado, owns three Colorado ski resorts: Keystone, Breckenridge, and Arapahoe Basin.

Ralston is a subsidiary of Ralcorp Holdings, Inc., a Missouri corporation headquartered in St. Louis, Missouri. Ralston Foods, Inc., a Nevada corporation, is also a subsidiary of Ralcorp Holdings, Inc., and is headquartered in St. Louis, Missouri. During the 1995-96 ski season, Ralston accounted for approximately 600,000 Front Range skier days, or over 26 percent of the Front Range market. Overall, Ralston's resorts had more than 2.6 million skier days and had revenues of more than $135 million.

Pursuant to a Stock Purchase Agreement among Vail Resorts, Inc., Ralston Foods, Inc., and Ralston Resorts Inc. dated July 22, 1996, Vail proposes to acquire all of the voting securities of Ralston, in return for which Ralston Foods, Inc. will receive voting securities of Vail valued at approximately $145 million. Vail will also assume or pay off debt of Ralston Foods amounting to at least $132 million and as much as $165 million under the Stock Purchase Agreement. The total consideration is valued at approximately $310 million. This proposed transaction combining the two largest owner/operators of ski resorts in Colorado precipitated the plaintiffs' antitrust suit.

B.   The Skiing Market

The Complaint alleges that the provision of downhill skiing to residents of Colorado's Front Range constitutes a relevant market for antitrust purposes -- that is, in the language of the Clayton Act, it is a "line of commerce" and is in a "section of the country." The Complaint further alleges that the effect of Vail's acquisition would be to lessen competition substantially in the provision of skiing to Front Range skiers.

The business of skiing comprises all services related to providing access to downhill skiing and snowboarding, including, but not limited to, providing lifts, ski patrol, snowmaking, design, building, and grooming of trails, skiing lessons, and ancillary services such as food service, entertainment, and lodging. Downhill skiing differs from other winter recreational activities, such as cross-country skiing, ice skating, snow-mobiling, sleigh riding, tobogganing, ice fishing, and taking cruises or vacationing in places with hot climates.[1/] A small but significant and nontransitory increase in prices for skiing would not cause a significant number of downhill skiers to substitute other recreational activities for skiing.

Customers of defendants' ski resorts include two types of skiers: destination skiers and Front Range skiers.[2/] Destination skiers come from outside Colorado, many from outside of the United States. These skiers ski for extended periods of time, typically for a week. Many destination skiers fly to their ski resort and are usually attracted to the resort by both the mountain (e.g., terrain, trails, lifts, and grooming) and resort amenities (e.g., lodging and night life). In contrast, Front Range skiers are day or overnight skiers. Most Front Range skiers drive to their ski resort and limit the resorts they use for day trips to those which fall within a radius of about two-and-one-half-hour travel time from where they live, and a somewhat larger radius for overnight trips. Front Range skiers are typically more interested in the mountain and skiing facilities than in the resort amenities.

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[1] Skiing is a discretionary recreational activity, but this does not, in itself, affect the antitrust analysis of whether skiing constitutes a product market. The antitrust laws protect and respect consumers' choices for discretionary products as well as for nondiscretionary products.

[2] The Complaint does not allege a violation of the Clayton Act for destination skiers or for types of skiers other than Front Range skiers. The Division's investigation did not reveal any likely anticompetitive effect from the proposed merger in the destination skier market or in other relevant markets such as the local skier market.

The defendants market their ski resorts differently to skiers depending on whether they are destination or Front Range skiers. They advertise their ski resorts outside the Front Range area of Colorado for destination skiers, for example, in major metropolitan newspapers and in magazines sold throughout the United States. In marketing to destination skiers, the resorts emphasize package pricing, which typically includes one or more of lift tickets, lodging, airfare, and also emphasize resort amenities as well as mountain features. In contrast, the defendants market their resorts to Front Range skiers by advertising in the Front Range, e.g., using direct mail within certain zip codes, billboards, and local newspapers. Front Range advertising, in contrast to destination skier advertising, emphasizes discount prices on lift tickets to the Front Range skier. There is also less emphasis on resort amenities as opposed to qualities of the mountains themselves.

The defendants' ski resorts use different pricing strategies depending on whether they are selling tickets to destination skiers or Front Range skiers. These resorts sell single-day and multi-day lift tickets through the resort ticket window primarily to the destination skier. In selling to Front Range skiers, these ski resorts sell single-day lift tickets through off-mountain retailers located within the Front Range that are discounted below the window lift ticket price. These resorts also offer the Front Range skier coupons that discount off the window ticket price, as well as frequent skier cards that provide discounts from the window price and may also provide a free day of skiing after a Front Range skier has paid for a certain number of lift tickets. Promotions are targeted to Front Range skiers, and measures are taken successfully to limit the access of destination skiers to such promotions. Consequently, the lift ticket prices defendants charge to Front Range skiers are different from the prices they charge to destination skiers.

C. Competition Between Vail and Ralston

Vail and Ralston compete directly to provide skiing to Front Range Colorado day and overnight skiers.

As noted above, Front Range skiers typically drive to their ski resort and limit the resorts they use for day trips to those which fall within a radius of about two-and-one-half-hour travel time from where they live, and a somewhat larger radius for overnight trips. The most popular of these resorts are located off Interstate 70 west of Denver. The Vail and Ralston resorts are located within this radius. Front Range skiers would not turn to resorts that fall outside of this two-and-one-half-hour radius in sufficient numbers to defeat a small but significant, non-transitory price increase imposed by resorts within this radius.

Resorts located farther away cannot, and after this transaction would not, constrain prices charged to skiers living in the Front Range. Although Front Range skiers occasionally choose to ski at more distant resorts, skiing at such resorts is not a practical or economic alternative for most Front Range skiers most of the time.

Ski resorts in Colorado that are within the distance which a Front Range resident will practicably travel for a day or a weekend skiing trip can charge different prices to these skiers than they charge to customers coming from other parts of the country or the world.

Thus, the provision of downhill skiing to Front Range residents is a relevant market within the meaning of Section 7 of the Clayton Act (i.e., is a "line of commerce" and is in a "section of the country"), and Vail and Ralston compete directly in this market.

D. Anticompetitive Consequences of the Acquisition

The Complaint alleges that the combination of Vail and Ralston would substantially increase concentration in the Front Range skier market, using the Herfindahl-Hirschman Index ("HHI")[3] as a measure of market concentration. The post-merger HHI, based on Front Range skier days derived from surveys of skiers conducted in 1994, 1995, and 1996, would be approximately 2,228 with a change in HHI of about 643 points. During the 1995-96 skiing season, Vail's resorts accounted for about 12 percent and Ralston's resorts over 26 percent of Front Range skier days. If the proposed acquisition were consummated, the combined company would account for over 38 percent of skier days in the Front Range market.

The Complaint further alleges that the acquisition of Ralston by Vail would substantially lessen competition. The transaction would have the following effects, among others:

1. competition generally in providing skiing to Front Range skiers would be lessened substantially;

2. actual competition between Vail and Ralston in providing skiing to Front Range skiers would be eliminated;

3. discounting to Front Range skiers by Vail and Ralston would likely be reduced;

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[3] The Herfindahl-Hirschman Index, or "HHI," is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is between 1000 and 1800 are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated.

4. prices for skiing to Front Range Colorado skiers would likely be increased.

The Complaint also alleges that successful entry or expansion in the skiing business would be difficult, time consuming, and costly, as well as extremely unlikely. Entry or expansion therefore would not be timely, likely, or sufficient to prevent any harm to competition.

Prices charged to Front Range skiers are constrained by competition among ski resorts for these skiers' business. That is, each ski resort is limited in raising its price by the fact that when a resort raises its price, it can lose revenues because customers switch to other ski resorts. Thus, a resort's prices are constrained by other resorts' prices. Similarly, if prices increase, some customers would ski less frequently. This, too, constrains the prices a resort may charge.

Acting in light of these facts, a ski resort (like any business) attempts to set a price that will earn it the most profit. It does not want to charge a price so high that it loses too many customers, nor does it want to charge a price so low that it misses the opportunity for the revenue that a higher price would bring. For each resort, the price that will maximize profit balances these two conflicting goals -- either a higher or a lower price would be less profitable. Businesses often cannot easily determine the profit-maximizing price, and may do so through trial and error. But the effort to find the profit-maximizing price -- that is, the price that neither drives away too many customers because it is too high nor misses revenue opportunities because it is too low -- is reflected in the day to day business decisions of ski resorts, as well as countless other businesses.

Economists have developed an analytical framework to explain how a merger can allow a firm to charge higher prices after acquiring a competitor, even if firms do not coordinate their behavior (such as by explicitly colluding with one another). Associated with this framework are standard tools that allow us to predict specific price effects. This framework has been called a "unilateral effects" model. It is particularly useful in markets that have differentiated products, that is, where products of different firms are not identical.[4] Each ski resort, for example, has characteristics, such as terrain and amenities, that different consumers value differently. This unilateral effects model is an additional tool to examine the accepted, common-sense notion that a merger is more likely to have a harmful effect if the merging firms are close competitors.

Before a merger, increases in price by two independent resorts are deterred by the loss of customers that would result from a price increase. If resorts are put under common ownership by a merger, however, they no longer constrain each other's prices in the same way. A merger can make a price increase profitable. In particular, before a merger, if two resorts are significant competitors to each other and one of these resorts increases its prices, a significant proportion of this resort's customers would be "lost" to the other resort. After a merger between these two resorts, however, some customers who switch away from the resort that raises its price would no longer be lost, but rather would be "recaptured" at the newly-acquired resort. Price increases that would have been unprofitable to either firm alone, therefore, would become profitable to the merged entity.

As a result of this recapture phenomenon, a merged firm, acting independently to earn the most profits it can, will choose higher prices than its two component firms did before the merger, if those firms were significant competitors to each other before the merger. The loss of competition that arises as a result of this effect is what is meant by a "unilateral" anticompetitive effect, that is, an effect that does not depend on the firms in the market acting interdependently. This unilateral effect will be larger as the recapture rate (which is sometimes called the "diversion ratio," see infra note 4)

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[4] See, e.g., Carl Shapiro, Mergers with Differentiated Products, 10 Antitrust 23 (1996).

is larger, as the margin earned on recaptured customers is higher, and as the customers who leave the merging firms in response to a price increase are fewer (in technical terms, the lower the "own price elasticity").

The Vail and Ralston resorts are close competitive alternatives for a number of Front Range skiers. Some of the customers who would switch away from Vail's resorts if Vail raised its price would instead go to Ralston resorts, and some customers who currently ski at Ralston's resorts would switch to Vail if Ralston raised its price. After the merger, Vail-Ralston would no longer lose revenues from these customers if it raised its price, because it would recapture the revenues from customers who would switch between Vail and Ralston in response to a price increase. The profit-maximizing price for the post-merger Vail-Ralston therefore would be higher than that for either firm before the merger. Moreover, once Vail and Ralston resorts charge higher prices, other resorts in the market have an incentive to raise their prices somewhat in response to less intense price competition for Front Range customers.

Economics allows us to estimate the likely unilateral effect of a merger if we have information on the elasticities, margins and recapture ratios. In this case, information about the Front Range Colorado skiing market permitted estimates of the relevant range of likely price increases. Existing surveys of Front Range skiers were used to estimate how many customers are likely to switch between Vail and Ralston resorts in response to a price change (the recapture ratios). Margin information was derived from accounting and marketing documents obtained from the parties. A range of likely elasticities was derived from a number of sources, including surveys, existing literature about the market, and market data on past price changes. In conjunction with other information about costs and demand in the market, this information permitted estimates of how much the profit-maximizing price for various resorts would increase as a result of the merger. It was estimated that, if the merger were allowed to take place without any divestiture, there would be an overall average increase in Front Range discounted lift ticket prices on the order of 4%, or about $1 per lift ticket on average to all Front Range customers, with higher price increases at the merging firms' resorts.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition for Front Range skiers in the operation of ski resorts in Colorado. Within one-hundred-and-fifty (150) calendar days after filing the proposed Final Judgment, defendants must sell all of Ralston's rights, titles, and interests in the Arapahoe Basin resort in Summit County, Colorado. The assets and interests will be sold to a purchaser who demonstrates to the sole satisfaction of the United States (which will consult with Colorado) that it will be an economically viable and effective competitor.

The divestiture ordered in the proposed Final Judgment resolves the anticompetitive problems raised by the proposed transaction. Since Ralston has jointly owned Arapahoe Basin, Keystone, and Breckenridge, these three resorts have not been competing against each other for customers. Divesting Arapahoe Basin restores significant competition among these mountains and, more generally, permits Arapahoe Basin to serve as an independent competitor for skiers throughout the Front Range. While Arapahoe Basin is smaller than the other Ralston resorts in absolute size, it has a high proportion of Front Range skiers (roughly one-quarter of Ralston's Front Range skier days last year were at Arapahoe Basin) and is thus relatively more competitively significant in the Front Range skiing market than its overall number of skier days might suggest. Furthermore, with a large percentage of its terrain attracting advanced intermediate and expert skiers, Arapahoe Basin competes directly with the bowl and glade skiing experience offered at a number of Vail’s mountains. A relatively small shift in skier days to Arapahoe Basin would make any significant price increase by the merged firm unprofitable. The calculations of profit-maximizing behavior described above suggest that, after the merger, once Arapahoe Basin is divested, any increase in average discounted prices to Front Range skiers would be negligible.

With this divestiture, the post-merger HHI for the Colorado Front Range skiing market will be below 1800 and the defendants’ post-merger market share in the Front Range will be less than 32%. Given the post-divestiture HHI level, the combined firm’s post-divestiture market share, and the number and size of independent competing ski resorts remaining in the affected markets, the proposed transaction is not likely to lead to a significant anticompetitive effect -- provided that Arapahoe Basin is divested.

Until the ordered divestiture takes place, defendants must take all reasonable steps necessary to accomplish the divestiture, and cooperate with any prospective purchaser. If defendants do not accomplish the ordered divestiture within the specified one-hundred-and-fifty (150) calendar day time period, which may be extended by the United States for two additional periods of time not to exceed ninety (90) calendar days in toto, the proposed Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestiture. In that case, defendants must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price for the assets to be divested, and to accomplish the divestiture as quickly as possible. After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee shall file promptly with the Court a report that sets forth: (1) the trustee's efforts to accomplish the divestiture, (2) the reasons, in the trustee's judgment, why the divestiture has not been accomplished, and (3) the trustee's recommendations. The trustee's report will be furnished to the parties and shall be filed in the public docket, except to the extent the report contains information the trustee deems confidential. The parties each will have the right to make additional recommendations to the Court. The Court shall enter such orders as it deems appropriate to carry out the purpose of the trust.

The Stipulation and proposed Final Judgment also impose a hold separate agreement that requires defendants to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, Ralston's Arapahoe Basin operations will be held separate and apart from, and operated independently of, defendants' other assets and businesses. Defendants must hire, subject to the prior approval of the United States, a person to serve as chief executive officer of Arapahoe Basin, who shall have complete authority to operate Arapahoe Basin in the ordinary course of business as a separate and independent business entity.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Vail or Ralston.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States, the State of Colorado, and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and, after consultation with the State of Colorado, will respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. <u>ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT</u>

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against Vail and Ralston. The United States is satisfied, however, that the divestiture of the assets and other relief contained in the proposed Final Judgment will preserve viable competition in the operation of ski resorts that otherwise would be affected adversely by the acquisition. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the government's Complaint.

VII. <u>STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT</u>

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court <u>may</u> consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the United States Court of Appeals for the D.C. Circuit has held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[5/] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660,

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[5] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[6/]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."[7/]

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[6] United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716; see also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'") (citations omitted).

[7] United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: January __, 1997

Respectfully submitted,

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